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No. 96-583

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ROSYLN UNION FREE SCHOOL DISTRICT NO. 3, *et al.*,
Petitioners

v.

EMILY HSU, BY AND THROUGH
HER NEXT FRIEND, DR. CHIN-CHING HSU, *et al.*,
Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Students in a public school sought recognition and the right to meet for a Christian Student Fellowship. The public school is subject to the requirements of the Equal Access Act, Title 20 U.S.C. §§ 4071 *et seq.* As contemplated by the students, all officers of the fellowship would have spiritual duties, including leading prayer, worship, and bible studies. For this reason, the students would have required officers to be adherents of the Christian faith. Because of the religious test for eligibility to hold office in the fellowship, the public school refused recognition and the right to meet to the Christian Student Fellowship. In the view of Respondents, the question presented is:

> Does a public school violate the Equal Access Act by denying equal access for a Christian Student Fellowship because the student members of the club, to protect the religious identity of the fellowship, require that officers of the fellowship be adherents of the religion with which the fellowship is identified?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Authorities iv

Constitutional and Statutory Provisions 1

Counter Statement of the Case .....

Reasons for Denying the Writ .....

I. THE DECISION BELOW IS INTERLOCUTORY AND NO SHOWING HAS BEEN MADE THAT REVIEW ON CERTIORARI IS NECESSARY TO PREVENT EXTRAORDINARY INCONVENIENCE AND EMBARRASMENT IN THE CONDUCT OF THE CASE .....

II. THE DECISION BELOW WAS CORRECT .....

A. The Second Circuit Correctly Concluded That The School District's Asserted Interest in Suppressing Discrimination Does Not Justify the Violation of the Hsus' Rights to Freedom of Speech and Freedom of Association .....

B. The Second Circuit Correctly Concluded That the Right to Associational Freedom Is Preferred When the Purpose of an Association, Such as the Christian Student Fellowship, Is Expressive .....

C. This Court's Decisions in *Rosenberger* and *Pinette* Confirm the Propriety of the Judgment of the United States Court of Appeals .....

D. The Decision of the Court of Appeals, which Compels the School District to Obey the Equal Access Act, does not put the District in Violation of the Establishment Clause and is Consistent with *Westside Community Schools v. Mergens* .....

TABLE OF CONTENTS—cont'd

Page

1. The Court of Appeals' decision does not put Roslyn School District in the position of taking any action that has the primary effect of advancing religion ....
2. The Court of Appeals' decision does not result in a "symbolic union" between the Walking on the Water Christian Student Fellowship and Roslyn Union Free School District No. 3 .....
3. The Court of Appeals' decision will not excessively entangle Roslyn Union Free School District No. 3 in religion .....

Conclusion .....

Appendix

Equal Access Act, P.L. 98-377, 98 Stat. 1303, 20 U.S.C. §§ 4071 *et seq.* 1a

TABLE OF AUTHORITIES

Page(s)

CASES

American Construction Co. v. Jacksonville, T. & K. Railway Co., 148 U.S. 372 (1893) 8

Board of Directors of Rotary International v. Rotary Club, 481 U.S. 537 (1987) 16, 18

Brotherhood of Locomotive Firemen v. Bangor & Aroostock R. Co., 389 U.S. 327 (1967) 9

Capitol Square Review and Advisory Board v. Pinette, 132 L.Ed.2d 650 (1995) 21-22

Corp. of Presiding Bishops v. Amos, 483 U.S. 327 (1987) 25-26, 29

Democratic Party of the United States v. Wisconsin, 450 U.S. 107 (1980) 14-16, 18

Everson v. Board of Education, 330 U.S. 1 (1946) 24-25

Grand Rapids School District v. Ball, 473 U.S. 373 (1985) .. 27

Hamilton-Brown Shoe Co. v. Wolf Brothers & Col, 240 U.S. 251 (1916) 9

Healy v. James, 408 U.S. 169 (1972) 15

Hsu v. Roslyn Union Free School District No. 3, 85 F.3d 839 (2nd Cir. 1996) 9-10

Hurley v. Irish-American Gay Lesbian and Bisexual Group of Boston, 132 L.Ed.2d 487 (1995) ..... 10, *passim*

Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) 27

Lynch v. Donnelly, 465 U.S. 668 (1984) 24

New York State Club Association, Inc. v. City of New York, 487 U.S. 1 (1988) 16, 17, 18

TABLE OF AUTHORITIES—cont'd

Page(s)

Roberts v. United States Jaycees, 468 U.S. 609 (1984) . 16-17, 18

Rosenberger v. Rector and Visitors of the University of Virginia, 18 F.3d 269 (4th Cir. 1994) 19

Rosenberger v. Rector and Visitors of the University of Virginia, 132 L.Ed.2d. 700 (1995), *rev'g*, 18 F.3d 269 (4th Cir. 1994) 19

Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) 11

Thomas v. Review Bd., 450 U.S. 707 (1981) 28

Tinker v. Des Moines School District, 393 U.S. 503 (1969) 18, 29-30

United States v. Seeger, 380 U.S. 163 (1965) 28

Westside Community Schools v. Mergens, 496 U.S. 226 (1990) ..... 22, *passim*

Widmar v. Vincent, 454 U.S. 263 (1981) 13, 25, 27

CONSTITUTIONAL and STATUTORY PROVISIONS

U.S. CONST. amend. XIV, § 1. ..... 1, *passim*

U.S. CONST. amend. I. ..... 1, *passim*

U.S. CONST. amend. I, cl. 1 ..... 24, *passim*

U.S. CONST. amend. I, cl. 2 26

U.S. CONST. amend I, cl. 3 26

Equal Access Act, P.L. 98-377, 98 Stat. 1303, 20 U.S.C. §§ 4071 *et seq.* ..... i, *passim*

Supreme Court Rule 10 ..... 7, 8

TABLE OF AUTHORITIES—cont'd

Page(s)

OTHER AUTHORITIES

L. TRIBE, AMERICAN CONSTITUTIONAL LAW 791 (1st ed. 1978) 15

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BRIEF OF RESPONDENTS IN OPPOSITION

CONSTITUTIONAL and STATUTORY PROVISIONS

The first amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

Section one of the fourteenth amendment provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

> United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

The Equal Access Act, P.L. 98-377, 98 Stat. 1303, 20 U.S.C. §§ 4071 *et seq.*, is reprinted in the Appendix hereto.

COUNTER-STATEMENT OF THE CASE

In September, 1993, Respondent Emily Hsu, then a high school senior, first applied for recognition of a religious club for students at Roslyn High School in Roslyn, New York. Pet. App. A6. Emily Hsu has now graduated from high school, Pet. App. A11 n.3, and her brother, Timothy, is now in his senior year in high school. *Cf.* Pet. App. A11 n.3. In the intervening three years, neither Emily Hsu nor Timothy Hsu has enjoyed "the right to pray in an after-school Bible group[,]" Pet. App. A67, or to exercise the right to form and participate in the life of their proposed club, the Walking on the Water Christian Student Fellowship.

It is undisputed that Roslyn Union Free School District No. 3 receives federal educational funds, that Roslyn High School is a public secondary school under state law, and that other clubs, unrelated to the curriculum of Roslyn High School, have been recognized by the Petitioners and permitted to organize and meet on campus during noninstructional times. Pet. App. A4.

Emily Hsu met with Mark Weyne, then the principal at Roslyn, and asked to use school facilities for the fellowship.

Pet. App. A6. Weyne told Hsu that he needed to research her request, and that he would contact her with a response. *Id.* In mid-November 1993, Emily Hsu and Jane Shin, another student interested in forming the bible club, met with Weyne and Marilyn Silverman, Assistant Superintendent of the School District. *Id.* These school officials stated that they needed time to reply because they were checking the legality of the fellowship and would contact them with their decision. *Id.*; Pet. App. A77.

In late November, Emily Hsu learned that the School Board would discuss her proposed club at a December 2, 1993 meeting. Pet. App. A6. At that meeting, Assistant Superintendent Silverman stated that the School District had to grant the request for a fellowship, even though it did not want the club to meet. *Id.* Silverman noted six requirements for approval, the first of which was that "membership must be open to all Roslyn students." Pet. App. A77-A78. One board member suggested that the School District "merely refuse federal financial assistance" to avoid the federal law. Pet. App. A6, A78. After discussion, that proposal was tabled. Pet. App. A6, A78.

On January 6, 1994, Emily Hsu and Jane Shin again met with Silverman and Dr. Howard Rubin, the new principal of Roslyn High School. Pet. App. A7, A78. During that meeting, the school officials told Emily Hsu that the School Board had taken no action on permitting her proposed club to meet, and that the School Board had a new requirement, a written constitution, before the application for the proposed bible club could be acted on. Pet. App. A7, A78. Emily Hsu submitted a proposed constitution on January 12, 1994. Pet. App. A7, A79. Several days later, Silverman told Emily Hsu that the School Board "had a problem with the Christian Bible club's

constitution." Pet. App. A9, A79.

Silverman said that "there were two sections of the constitution which the [School Board] wanted changed": Article I, Section I and Article V, Section II. JA 186. The School Board wanted the word "Christian" changed to "people" in the constitution's definition of "Christian fellowship" found in Article I, Section I. That definition provided that "Christian fellowship is when Christians gather to praise God . . . ." Pet. App. A9, A79-A80. The School Board "felt that the word 'Christian' was too exclusive." Pet. App. A79. The Board also wanted Article V, Section II, changed. That section provided that "[o]fficers must be professed Christians either through baptism or confirmation." The School Board wanted this section changed so that "officers merely were required to be members of the Christian Bible club with the right to vote." Pet. App. A9, A78-A80.

Emily Hsu agreed to change the definition of "fellowship." Pet. App. A9, A79. Regarding the requested change of the provision on eligibility for office, Emily Hsu changed the Constitution to read, "All members eligible to vote will also be eligible to run for offices. Accepting Jesus Christ as savior is a requirement for all officers." Pet. App. A9, A79.

Again, on about January 26, 1994, Emily Hsu and Jane Shin met with Silverman, on that occasion joined by Frank Tassone, Superintendent of the School District. Pet. App. A9, A80. Silverman and Tassone asked Emily Hsu to remove the constitutional requirement that officers must be Christians. Pet. App. A9, A80. Hsu refused that request because, to her, such an amendment "would violate . . . sincerely-held religious beliefs that all club officers should be Christians." Pet. App. A80. Silverman and Tassone stated that, without amendment, the School Board would not approve the club. Pet. App. A80.

The duties of the officers proposed for the Walking on the Water Christian Student Fellowship "carr[y] significant spiritual responsibility and import." Pet. App. A83. The officers include President, Vice-President, Secretary, Music Coordinator and Activities Coordinator. *Id.* The responsibilities of each office are the basis for the christian commitment qualification.

The President is responsible for the "overall spiritual direction and oversight of the Bible club" and "the spiritual content of the regular weekly meetings." *Id.* The Vice-President assists the President in his duties and, in the President's absence, performs the presidential functions. *Id.* Similarly, the Secretary, in the President's and Vice-President's absences, is required to perform the presidential functions. *Id.* The Music Coordinator must select "appropriate praise and worship songs to be used at the weekly meeting" and "lead[] the singing and worship of the Lord by 'exhalt[ing] the Lord Jesus Christ and creat[e] a sense and spirit of unity among those singing.'" *Id.*

The Activities Coordinator plans and oversees activities and "determin[es] which activities would be appropriate in which to participate, e.g., a canned food drive, and those activities in which participation would offend Christian sensibilities, e.g., condom distribution." Pet. App. A84. Further, each officer must "[b]e prepared . . . to be called upon at any time to open or close a meeting with prayer . . . or to lead a Bible study," "[b]e prepared . . . to serve as a spokesperson for the Bible club in relating the Christian perspective on any particular issue," and, "be able to give testimony to the life-changing presence of Jesus Christ in his/her life and relate that experience in terms of on-going application to the lives of others." *Id.*

On or about January 31, 1994, Emily Hsu submitted the Walking on the Water Christian Student Fellowship constitution, without further revision, to Silverman, who refused to forward the constitution to the School Board for approval. Pet. App. A10, A80.

At that juncture, Emily Hsu had been seeking unsuccessfully the right to set up and participate in the Walking on the Water Christian Student Fellowship for five months. Pet. App. A10. So, on February 16, 1994, Emily and Timothy Hsu filed the instant action for declaratory relief, damages, and preliminary and permanent injunctive relief against the School District's further denial of equal access rights for the Walking on the Water Christian Student Fellowship. Pet. App. A10-A11.

On about March 10, 1994, after the Hsus filed suit but before any hearing therein, the School Board passed a resolution purporting to recognize the formation of the fellowship and purporting to grant the group access to school facilities. Pet. App. A11-A13. The resolution, however, conditioned the recognition of the Walking on the Water Christian Student Fellowship on the willingness of the club to abandon the religious qualification for office in the club. Pet. App. A12-A13.

Although the Walking on the Water Christian Student Fellowship has never been allowed to organize and begin meeting, many other student clubs and organizations meet at Roslyn High School and enjoy official recognition. Pet. App. A76. With recognition comes rights, including access to meeting areas and the right to advertise. *Id.* Among the student clubs and organizations that have enjoyed recognition and the rights attendant to recognition are American Field Service, Art Club, Astronomy Club, Band, Chamber Singers, Chess Club,

Chorus, Computer Club, Fashion Club, Forensics, French Club, Freshman Orientation, Harbor Hill Light (the yearbook), Hilltop Beacon (the newspaper), Human Relations Club, International Ambassadors Club, Jazz Band, Key Club, Math Club, Mock Trial, Model Congress, National Honor Society, Organization of Class Councils, Peer Counseling, Roslyn Athletics Club, Roslyn Singers, Royal Crown Players, Science Olympiad, Spanish Club, Student Prints (a literary magazine), Students Against Drunk Driving, Students for Social Responsibility, Students Protecting the Environment Against Contamination, Students for the Ethical Treatment of Animals, and Volunteers for the Education of Retarded Youths. Pet. App. A36-A37 n.19, A76. Some of those clubs are curriculum related, but others clearly are not. Pet. App. A76.

REASONS FOR DENYING THE WRIT

The decision below, deciding an interlocutory appeal from the denial of preliminary injunctive relief and remanding for further proceedings, while technically an appealable order, fails to present those exigent considerations that warrant the exercise of this Court's discretionary *certiorari* jurisdiction. The School District has failed to demonstrate danger of extraordinary inconvenience or embarrassment in the further conduct of this case on remand.

Insofar as challenged by the Petitioners, the decision below is a simple and correct application of this Court's previous decisions. Petitioners do not cite any decision of a federal circuit or a state court of last resort with which the decision below conflicts. The petition, further, does not present any substantial question of federal law. Because none of the usual considerations supporting the grant of a Writ is present here, *see* Supreme Court Rule 10, the Petition should be denied.

I. THE DECISION BELOW IS INTERLOCUTORY AND NO SHOWING HAS BEEN MADE THAT REVIEW ON CERTIORARI IS NECESSARY TO PREVENT EXTRAORDINARY INCONVENIENCE AND EMBARRASMENT IN THE CONDUCT OF THE CASE

The Hsus do not contest the formal legal fact that this Court possesses authority to grant the petition for a writ of certiorari in this case. But this Court has spoken through its Rules and its decisions regarding the discretionary exercise of its authority to review cases on certiorari. And, in light of that counsel, the Hsus conclude that this Petition lacks merit. For example, in Supreme Court Rule 10, this Court reminds all Petitioners, "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." In this instance, compelling reasons have not been offered by the Petitioners, and the exercise of sound discretion counsels against the grant of the writ because of the lack of finality in the decision sought to be reviewed.

The order that Petitioners would have this Court review on certiorari does not provide a sound basis for the exercise of discretionary review.

First, it is the obligation of the Petitioners to demonstrate in its petition seeking review of a nonfinal order that review "is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co. v. Jacksonville, T. & K. Railway Co.*, 148 U.S. 372, 384 (1893). No such showing is even proffered by the Petitioners. Further, the Petition fails to account for the fact that the court below remanded the case to the trial court for such further proceedings as may be necessary. Pet. App. A68.

In this respect, the Petition should be denied, "because the Court of Appeals remanded the case [and thus it] is not yet ripe for review by this Court . . . ." *Brotherhood of Locomotive Firemen v. Bangor & Aroostock R. Co.*, 389 U.S. 327, 328 (1967).

Second, the Court's interlocutory consideration of the case is not required "to secure uniformity of decision." *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916). There simply is no split among the circuits on the questions presented in the Petition. *See* Pet. at i. Petitioners have not asserted any circuit conflict as a possible consideration in favor of granting the petition and there is no such conflict. Consequently, "uniformity of decision" does not appear threatened by allowing this matter to be treated in the normal course by the district court as the court of appeals ordered.

II. THE DECISION BELOW WAS CORRECT

The judgment of the United States Court of Appeals for the Second Circuit reflects a direct and sound application of this Court's decisions regarding freedom of association and religious expression by private speakers in governmentally-controlled fora. So unremarkable was that decision that no active judge of the Second Circuit even requested a vote on the Applicants' suggestion of rehearing in banc. Pet. App. A72-A73.

In *Hsu v. Roslyn Union Free School District No. 3*, 85 F.3d 839 (2nd Cir. 1996), Pet. App. A1 *et seq*, the United States Court of Appeals for the Second Circuit correctly concluded that the ability of a private religious fellowship of public school students to insure the stability of its religious identity would be unlawfully hampered by the application to the student group of the Petitioners' antidiscrimination policies. Pet. App. A39-A41. Specifically, the Second Circuit held,

> when a sectarian religious club discriminates on the basis of religion for the purpose of assuring the sectarian

> religious character of its meetings, a school must allow it to do so unless that club's specific form of discrimination would be invidious (and would thereby violate the equal protection rights of other students), or would disrupt or impair the school's educational mission.

Pet. App. A68.

A. The Second Circuit Correctly Concluded That The School District's Asserted Interest in Suppressing Discrimination Does Not Justify the Violation of the Hsus' Rights to Freedom of Speech and Freedom of Association

Petitioners take issue with the Second Circuit's reliance on the unanimous decision of this Court in *Hurley v. Irish-American Gay Lesbian and Bisexual Group of Boston*, 132 L.Ed.2d 487 (1995). *See* Petition at 17-18. *Hurley* illuminates the Hsus' claims by showing how the make-up of a group (and, thus, the identity of the group) contributes to and shapes the group's message.

In *Hurley*, Justice Souter, writing for the unanimous Court, stated that the issue presented was "whether Massachusetts may require private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey." 132 L.Ed.2d at 495. And, in short answer, this Court stated, "[w]e hold that such a mandate violates the First Amendment." *Id.* In the matter at bar, a New York school district would have forced a Christian student fellowship to include, not merely as members but as leaders, persons who do not share the religious faith and ideology of the fellowship. Such compulsion "violates the First Amendment."

This Court has described religious freedom in terms directly relevant to the Respondents' claim:

> religious freedom encompasses the power of religious bodies to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.

Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696, 722 (1976). Deciding such matters as qualifications for membership and leadership of a club or association are fundamentally exercises of the right to freedom of speech. Selection of leaders reflects and influences the nature and identity of the group, and is an important aspect of speaker autonomy. As this Court explained in *Hurley*,

> Under [the Supreme Judicial Court's] approach any contingent of protected individuals with a message would have the right to participate in petitioners' speech, so that the communication produced by the private organizers would be shaped by all those protected by the law who wished to join in with some expressive demonstration of their own. But this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.

132 L.Ed.2d at 503. In *Hurley*, this Court also noted a simile between composers and parade organizers which is apt here:

> [L]ike a composer, the Council selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the Council's eyes comports with what merits celebration on that day. . . . [T]he Council clearly decided to exclude a message that it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another.

Id.

Here, the Walking on the Water Christian Student Fellowship needs to select from the pool of potential participating students only those students whose faith commitments make them suitable to lead and guide the fellowship. That need has been frustrated since September 1993 by the School District's application of its nondiscrimination policy to a private, religious, student group. The Christian Student Fellowship's determination that its spiritual leaders must possess the requisite qualification of a faith commitment to Jesus Christ is, itself, a form of expression.

The decision to reject the nondiscrimination policy is a message. Specifically, the message is that only those with a public commitment of faith in Jesus Christ have the necessary qualifications to be the spiritual directors of a christian student fellowship. The School District wishes the fellowship to transmit a different, and contrary message, that any student, regardless of their faith or commitment is equally qualified to serve the fellowship as an officer thereof.

Those two messages, that of the fellowship and that of the School District, directly conflict. To enjoy access to the club forum at Roslyn, all that Timothy Hsu must do is agree to promote the School District's message by foregoing the requirement that officers of the fellowship demonstrate public commitment to Jesus Christ. The School District and the District Court forgot that "whatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, [which] choice is presumed to lie beyond the government's power to control." *Hurley*, 132 L.Ed.2d at 504.

The Christian student fellowship is a private organization. Except under unusual circumstances not present here, student-initiated religious groups on public high school campuses could not be deemed "school groups" or "school programs." The

chasm between the students' fellowship and the school district was affirmed by the School District, which announced the measures it would take to distinguish itself from the activities of the Christian student fellowship in a resolution adopted on March 10, 1994:

> IT IS HEREBY FURTHER RESOLVED that the Superintendent of Schools is hereby directed to cause all listings, communications and announcements issued by the District pertaining to said Club expressly to state that the Roslyn School District does not endorse the Club, but is mandated by the Federal Equal Access Act to permit the Club's activities, same to be on a voluntary basis and to be held on school premises during non-school hours only.

Pet. App. A13.

This Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981) was premised on the principle that the programs, activities, and expression of student groups cannot fairly be attributed to the university itself. 454 U.S. at 270-74. Indeed, in *Widmar* this Court stated, "an open forum at a public university does not confer any imprimatur of state approval on religious sects or practices." 454 U.S. at 274.

B. The Second Circuit Correctly Concluded That the Right to Associational Freedom Is Preferred When the Purpose of an Association, Such as the Christian Student Fellowship, Is Expressive

This Court has taken pains to demonstrate that the right to associational freedom is at its zenith when the purpose of a particular group is expressive (such as with a religious, political or philosophical group) and where governmental interference with the membership criteria are considerably likely to hinder the group's message.

In *Democratic Party of the United States v. Wisconsin*, 450 U.S. 107 (1980), this Court confronted a dispute between the Democratic Party and its Wisconsin affiliate that resulted from the national party's refusal to seat the Wisconsin delegation at the convention because the delegates were chosen in a manner inconsistent with the selection criteria of the national party. *Id.* The Wisconsin affiliate sought a declaration that the national party was compelled to seat the Wisconsin delegation. The Wisconsin courts granted the declaration. *Id.* This Court reversed, stating:

> This First Amendment freedom to gather in association for the purpose of advancing shared beliefs is protected by the Fourteenth Amendment from infringement by any State. [] And the freedom to associate for the common advancement of political beliefs [] necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only. Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents.

450 U.S. 121-22 (citations, footnote and quotation marks omitted).

In the context of party politics, this Court noted, "the inclusion of persons unaffiliated with a political party may seriously distort its collective decisions–thus impairing the party's essential functions . . . ." 450 U.S. at 122. Likewise, in the religious context, it cannot be doubted that the "inclusion of persons" who do not share the group's religious beliefs and commitments may "seriously distort" the groups collective functions and impair the group's "essential functions."

Democratic Party of the United States is directly relevant. Petitioners offer no principled basis on which to posit that group associations for the purpose of religious expression or

student associations for expressive purposes are deserving of less protection than such associations directed at political expression. To the contrary is this Court's decision in *Healy v. James*, 408 U.S. 169 (1972). There this Court explained that

> [a]mong the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition. [] There can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that associational right. The primary impediment to free association flowing from nonrecognition is the denial of use of campus facilities for meetings and other appropriate purposes.

408 U.S. at 181.[1]

The associational freedom of the Walking on the Water Christian Student Fellowship "presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." 450 U.S. at 122. The fellowship has chosen to "define [its] associational rights by limiting those who could" be selected as leaders for the group. *Id.* Officers of the fellowship must have a demonstrated christian commitment. Pet. App. A9, A80. As with Wisconsin's interference with the delegate selection process in

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1. One commentator has noted, "[f]reedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 791 (1st ed. 1978) (quoted in *Democratic Party of the United States*, 450 U.S. at 122 n.22).

Democratic Party of the United States, the School District's rejection of the Christian student fellowship's prerequisite, that officers have proven christian commitment, "may seriously distort" the fellowship's "collective decisions" and "impair[] the [fellowship's] essential functions." 450 U.S. at 122.[2]

In *Roberts v. United States Jaycees*, this Court explained,

> An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. [] According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from

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2. Subsequent to *Democratic Party of the United States*, this Court has decided three cases addressing application of state or local antidiscrimination requirements to associations that were, assertedly, "private." *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (affirming constitutionality of Minnesota Human Rights Act's prohibition of sex discrimination as applied to a local chapter of the Jaycees); *Board of Directors of Rotary International v. Rotary Club*, 481 U.S. 537 (1987) (affirming constitutionality of California public accommodations statute prohibiting sex discrimination as applied to Rotary Clubs); *New York State Club Association, Inc. v. City of New York*, 487 U.S. 1 (1988) (affirming constitutionality of New York City antidiscrimination ordinance against facial challenge by a coalition of clubs). In each of these cases, the Court distinguished the commercial, business-orientation of regulated associations from genuinely religious, political or philosophically oriented groups. *Roberts*, 468 U.S. at 626; *Rotary Club*, 481 U.S. at 546-47; *New York State Club Association, Inc.*, 487 U.S. at 12-13. Those decisions do not retrench upon *Democratic Party of the United States* in any way. Rather, in those cases this Court explained the important nexus between the associational right and the freedoms explicitly stated in the First Amendment.

> suppression by the majority. [] Consequently, *we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.*

Roberts, 468 U.S. at 622 (citations omitted, emphasis added). And, in *New York State Club Ass'n*, 487 U.S. at 13, this Court explained,

> The ability and opportunity to combine with others to advance one's views is a powerful practical means of ensuring the perpetuation of the freedoms of the First Amendment. Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.

(Citation omitted). But unlike the New York City law at issue in *New York Club Ass'n*, the School District's imposition of the nondiscrimination policy on the Christian student fellowship will affect "the ability of individuals to form associations that will advocate public or private viewpoints[,]" and it will "require the [fellowship] to abandon or alter . . . activities that are protected by the First Amendment[,]" and, although the fellowship "seeks to exclude individuals [from office] who do not share the views that the [fellowship members] wish to promote," the nondiscrimination policy flatly bars the Walking on the Water Christian Student Fellowship from doing so. *New York State Club Ass'n*, 487 U.S. at 13 (citations, quotation marks omitted).

Taken together, these cases establish a fairly clear rule on the freedom of association: when the basis of a group's "discrimination" is ideological (whether religious, political or

philosophical), that "discrimination" is absolutely protected by the First Amendment. *Democratic Party of the United States.* Where a group uses an immutable characteristic, such as race or sex, the group's discriminatory practice will be subjected to strict scrutiny because race and sex are not apt measures for adherence to the idealogy of a religious, political or philosophical group.

In light of *Democratic Party of the United States*, *Roberts*, *Rotary Club*, and *New York State Club Association, Inc.*, it is clear that the School District is barred by the First and Fourteenth Amendments of the Constitution from interfering with the fellowship's creation and maintenance of a distinctive spiritual identity.

Emily and Timothy Hsu, and those who would participate in the activities of the Walking on the Water Christian Student Fellowship, are not serfs in a totalitarian regime. The School District's unabashed approach to the request for recognition ignores the fact that

> [i]n our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.

Tinker v. Des Moines School District, 393 U.S. 503, 511 (1969). Just as the individual student is not a closed-circuit recipient of the State's preferred message, the private, student-led, religious

group is not some mere passive channel of communication of the messages of others.

In *Hurley*, this Court addressed this point, that the State could not treat the parade as a First Amendment analog to a local cable television company, which company may carry a great variety of programming without any danger that particular messages will be attributed to it. *Hurley*, 132 L.Ed.2d at 504-05.

The selection of leaders for the Walking on the Water Christian Student Fellowship, like the selection of parade participants for the St. Patrick's Day Parade, communicates a message and, as this Court noted, "every participating unit [in a parade] affects the message conveyed by the private organizers . . . ." 132 L.Ed.2d at 503. The Christian Student Fellowship, by having and enforcing its requirement that leaders of the fellowship have a demonstrated commitment to the religious faith propounded by it, expresses to others the importance of that commitment. The ***application*** of the nondiscrimination policy to the fellowship abridged the Hsus' free speech and freedom of association rights.

C. This Court's Decisions in *Rosenberger* and *Pinette* Confirm the Propriety of the Judgment of the United States Court of Appeals

In the court of appeals, the Petitioners had relied on the decision of the United States Court of Appeals for the Fourth Circuit in *Rosenberger v. Rector and Visitors of the University of Virginia*, 18 F.3d 269 (4th Cir. 1994). Subsequently, however, this Court reversed the judgment of the Fourth Circuit, in *Rosenberger v. Rector and Visitors of the University of Virginia*, 132 L.Ed.2d. 700 (1995), *rev'g*, 18 F.3d 269 (4th Cir. 1994). Writing for the majority in *Rosenberger*, Justice Kennedy laid important groundwork that supports the Respondents here:

> It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. . . . In the realm of private speech or expression, government regulation may not favor one speaker over another. Discrimination against speech because of its message is presumed to be unconstitutional. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.

132 L.Ed.2d at 714-15 (citations omitted). Justice Kennedy noted:

> These principles provide the framework forbidding the State from exercising viewpoint discrimination, even when the limited public forum is one of its own creation. . . . There is no question that the District, like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated. The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics. Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, nor may it discriminate against speech on the basis of its viewpoint[.]

132 L.Ed.2d at 715-16 (internal quotation marks and citations omitted).

The School District's nondiscrimination policy excludes speech where the distinction is not reasonable in light of the purpose of the forum. It has been established already that a limited open forum exists at Roslyn High School. Consequently, the purpose of the forum has to be interpreted

in a manner consistent with the toleration of competing and diverse political, philosophical and religious groups. In that sense, the refusal to exempt the Christian Student Fellowship from the nondiscrimination policy (so that the group may foster and enjoy its group identity and exercise its religious liberties) is unreasonable. Further, because the nature of a group and its leadership structure sends a message about the group, the School District's application of the non-discrimination policy to exclude the Christian Student Fellowship from campus is a policy of discrimination on the basis of content and viewpoint of speech, which the *Rosenberger* decision repudiates.

In *Capitol Square Review and Advisory Board v. Pinette*, 132 L.Ed.2d 650 (1995), this Court concluded that, while there may be cases in which it is necessary to enforce a content-based restriction on speech in order to avoid violating the Establishment Clause, 132 L.Ed.2d at 661, the decision to deny the Ku Klux Klan the right to erect a Latin Cross on public forum property at the State Capitol in Columbus, Ohio could not be justified on the facts presented there.

Writing for the majority, Justice Scalia explained,

> We have twice previously addressed the combination of private religious expression, a forum available for public use, content-based regulation, and a State's interest in complying with the Establishment Clause. Both times, we have struck down the restriction on religious content. . . . Lamb's Chapel followed naturally from our decision in Widmar, in which we examined a public university's exclusion of student religious groups from facilities available to other student groups. There also we addressed official discrimination against groups who wished to use a "generally open forum" for religious

> speech. And there also the State claimed that its compelling interest in complying with the Establishment Clause justified the content-based restriction. We rejected the defense because the forum created by the State was open to a broad spectrum of groups and would provide only incidental benefit to religion. We stated categorically that *"an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices."*

132 L.Ed.2d at 661 (citations omitted, emphasis added).

The School District argues that exempting the student-led, student-initiated Christian Student Fellowship from the School District' nondiscrimination policy would communicate a message of government approval or endorsement of the religious views of the Hsus. *See* Petition at 23-24, 26. This business of determining the statutory and constitutional rights of others, including the Respondent students, by hazarding guesses about the uninformed perceptions of others, lacks constitutional pedigree and merit.

Furthermore, that argument is defective, as this Court demonstrated in *Westside Community Schools v. Mergens*, 496 U.S. 226 (1990). In *Mergens*, the Westside Community Schools argued that

> because student religious meetings are held under school aegis, and because the State's compulsory attendance laws bring the students together . . . an objective observer will perceive official support for such religious meetings.
>
> We disagree. . . . [T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the free Speech and Free Exercise Clauses protect.

496 U.S. at 249-50 (citations omitted, emphases in original).

Although the School District believes that the exemption to the nondiscrimination policy that will be enjoyed by the Christian student fellowship under the judgment of the Second Circuit will be misunderstood as an endorsement, this Court has taken a different view of the judgmental maturity of public secondary school students:

> We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis. . . . The proposition that schools do not endorse everything they fail to censor is not complicated.

496 U.S. at 250.

By allowing the Christian Student Fellowship the liberty to protect its identity, through the requirement that officers profess faith in Jesus Christ, the School District conveys no message of endorsement of religion. The court below, consequently, correctly concluded that the exemption would merely maintain the benevolent neutrality toward the Christian Student Fellowship that the Constitution requires of it.

D. The Decision of the Court of Appeals, which Compels the School District to Obey the Equal Access Act, does not put the District in Violation of the Establishment Clause and is Consistent with *Westside Community Schools v. Mergens*

The Petitioners argue that the decision of the court of appeals puts the Roslyn School District in danger of running afoul of two prongs of the *Lemon* Test.[3] First, the Petitioners

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3. In the court below, the Petitioners argued that the exemption for the Walking on the Water Christian Student Fellowship would

assert that "[g]ranting the Walking on Water [Christian Student Fellowship] an exemption from the District's policy has the primary effect of advancing its religion." Pet. at 26. In that regard, the Petitioners further allege that the decision below "is not a mere accommodation of the needs of religious students but a "symbolic union between church and state." Pet. at 27. Second, the Petitioners assert that "[t]he court of appeals failed to appreciate the extent to which a public school will become entangled in religious matters if it is required to exempt a religion club from its nondiscrimination policy." Pet. at 28.

The Establishment Clause arguments interposed by Petitioners are not well-taken. Permitting the Walking on the Water Christian Student Fellowship to meet, now three years after the request for recognition and the right to meet was first made, does not put the Roslyn School District in violation of the Establishment Clause anymore than allowing Bridget Mergens' bible club to meet put the Westside Community Schools in violation of the Establishment Clause. *Cf. Westside Community Schools v. Mergens*, 496 U.S. 226 (1990).

1. The Court of Appeals' decision does not put Roslyn School District in the position of taking any action that has the primary effect of advancing religion. The second prong of the *Lemon* test inquires whether, as a principal or primary effect, governmental action advances or inhibits religion. In *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (and cases cited), this Court explained that the Establishment Clause "affirmatively mandates accommodation, not merely tolerance,

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violate all three prongs of the *Lemon* Test. *See* Pet. App. A42. The Petitioners have apparently abandoned any claim that the exemption would violate the first prong of the *Lemon* Test, that is, that the exemption has no "secular purpose."

of all religions, and forbids hostility toward any." *See also Everson v. Board of Education*, 330 U.S. 1, 17-18 (1946) ("Establishment Clause forbids use of government power to handicap religion"); *Mergens*, 496 U.S. at 248, 253; *Widmar v. Vincent*, 454 U.S. 263, 271 (1981) (refusing access for religious student group shows hostility to religion). The decision below addressed and adequately answered the Petitioners' argument on this point.

The court of appeals found three convincing rationales for its conclusion that the exemption for the Christian Student Fellowship would not have the primary effect of advancing religion.

First, the court found dispositive the reasoning of this Court in *Mergens*, *see* Pet. App. A49-A50, that compliance with the Equal Access Act would not work an "endorsement" of religious speech. The court below found "no indication, however, that the religious activities of the Walking on Water [Christian Student Fellowship would] be any different from the religious activities of the Bible Club at issue in *Mergens*." Pet. App. A49-A50.

Second, the court below confronted "[t]he salient difference between this case and *Mergens*," in its view, the "dispensation" that the Christian Student Fellowship "needs with respect to the school's nondiscrimination policy." In its judgment, such an exemption simply put the Christian Student Fellowship on an equal footing with "non-religious clubs who make distinctions among their members on the basis of commitment." Pet. App. A50.

Third, the court below correctly concluded that "[e]ven if the exemption from the nondiscrimination policy is viewed as a 'benefit,'" "there still is no Establishment Clause violation." Pet. App. A50. Relying on this Court's decision in *Corporation*

of Presiding Bishops v. Amos, 483 U.S. 327, 337 (1987), the court found that "the flow of a 'benefit' only to a religious group does not mean that the government's actions are advancing religion." Instead, the exemption would simply allow the Christian Student Fellowship to advance its religion, an activity that enjoys the protection of two constitutional clauses: the right to free exercise of religion, U.S. CONST. amend. I, cl. 2, and the right to freedom of speech, U.S. CONST. amend I, cl. 3. *Cf. Mergens*, at 250 ("there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect"). Given that "crucial difference," the court below cogently noted that "allowing people with religious faith to advance their religions is not what is meant by 'the establishment of religion . . . .'" Pet. App. A50-A51. But to this point, the court of appeals also found, "the exemption cannot be considered an endorsement by the School of the Hsus' religion or the Club's leadership policy[,]" because the exemption "simply allows the Club to pursue a leadership policy that it reasonably considers critical to its ability to hold religious meetings at the school . . . ." Pet. App. A51.

2. The Court of Appeals' decision does not result in a "symbolic union" between the Walking on the Water Christian Student Fellowship and Roslyn Union Free School District No. 3. The evident hostility of the School District to the Walking on the Water Christian Student Fellowship makes the assertion of a "symbolic union" untenable. *See* Counter-Statement of Facts, *supra* at 2 *et seq*. Emily Hsu graduated from high school without ever having the opportunity to participate in the formation and conduct of her planned religious fellowship. Timothy Hsu, a freshman at the outset of the dispute here, is now a Senior, and was unable to enjoy such

rights for three years of his high school education. *Id.* The School District, prior to litigation, simply refused to recognize the federal equal access rights of the Respondents on any terms. *Id.* Five months of roadblocks and stumble stones were cast by the Petitioners between the Respondents and the enjoyment of their constitutional and statutory rights, *id.*, precipitating the only thing that has yielded any hope of toleration and accommodation in this dispute (i.e., litigation). *Id.*

No reasonable observer of this dispute, and the resolution of it reached by the court below, would conclude that a "symbolic union" had come into existence here. In *Grand Rapids School District v. Ball*, 473 U.S. 373, 389-90 (1985), this Court explained the "symbolic union" paradigm in this way:

> As we stated in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125-126 (1982): '[T]he mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred.' *See also Widmar v. Vincent*, 454 U.S. 263, 274 (1981) (finding effect 'incidental' and not 'primary' because it 'does not confer any imprimatur of state approval on religious sects or practices').
>
> It follows that an important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices.

Of course, given the evident hostility of the Petitioners' to the religious activities of the Respondents', and given the explicit disclaimer of endorsement adopted by the School District, *see* Pet. App. A135, there is no likelihood that

Respondents with perceive an endorsement of their religious choices by the School District. Nor, for these same reasons, is there any likelihood that others, nonadherents of Respondents' faith, will perceive the exemption as an expression of disapproval of their religious choices by the School District. In other words, the "symbolic union" paradigm is simply not presented here, for no one could reasonably conclude that any "joint exercise" of authority by Church and State was taking place here.

3. The Court of Appeals' decision will not excessively entangle Roslyn Union Free School District No. 3 in religion. There is no danger of entanglement from accommodation of the religious needs of the Walking on the Water Christian Student Fellowship, and the court below correctly so held. Pet. App. A53-54. The Petitioners' argument, that entanglement would result from the need of school officials and the District to "determine in the first instance whether the proposed discrimination is based on a true religious tenet or is simply a preference expressed in religious terms in order to obtain a special government authorized privilege . . . ." Pet. at 28. But those exact judgments, whether a religious belief is being asserted and whether that religious belief is sincerely-held, are ones that government agencies and actors already have to be comfortable making.[4]

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4. *Cf. Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981) ("[t]he determination of what is a 'religious' belief or practice . . . is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection"); *United States v. Seeger*, 380 U.S. 163, 183-84 (1965) ("the test is simple of application[,] namely, does the claimed belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption? Moreover, it

The Petitioners make the convenient, but specious, assertion that the decision below "forces school officials into the role of evaluating the legitimacy of the student's religion and the sincerity of his religious beliefs." Pet. at 28. This contention is without merit for two reasons. First, the obligation to examine claims of religious free exercise already compels governments to inquire into sincerity of religious belief, *see* n.4, *supra*. Second, the Petitioners would not be "forced" to take such action; rather, they will have chosen to take the more onerous and intrusive approach to the matter, while ignoring the better way. That better way, ignored by the School District, is to allow religious groups generally, and the christian student fellowship particularly, to "exist without sponsorship and without interference." *Amos*, 483 U.S. at 334. Here, the School District simply refuses to allow the christian student fellowship to "exist . . . without interference."

The remaining contentions of the Petitioners' entanglement argument are mere phantoms, specters conjured up without support in the record. More is required for schools and school officials to suppress the federal rights of students than the nonexistent and unproven imaginings of febrile minds. This Court, in *Tinker v. Des Moines School District*, 393 U.S. 503 (1969), succinctly disposed of irrational fear as the basis for suppression of students' rights:

> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by

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must be remembered that in resolving these exemption problems one deals with the beliefs of different individuals who will articulate them in a multitude of ways. In such an intensely personal area, of course, the claim of the registrant that his belief is an essential part of a religious faith must be given great weight").

> something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.

393 U.S. at 509 (citation omitted).

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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APPENDIX

§ 4071. Denial of equal access prohibited

(a) Restriction of limited open forum on basis of religious, political, philosophical, or other speech content prohibited

It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

(b) "Limited open forum" defined

A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

(c) Fair opportunity criteria

Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that–

(1) the meeting is voluntary and student-initiated;

(2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;

(3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;

(4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and

(5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

(d) Construction of subchapter with respect to certain rights

Nothing in this subchapter shall be construed to authorize the United States or any State or political subdivision thereof–

(1) to influence the form or content of any prayer or other religious activity;

(2) to require any person to participate in prayer or other religious activity;

(3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;

(4) to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;

(5) to sanction meetings that are otherwise unlawful;

(6) to limit the rights of groups of students which are not of a specified numerical size; or

(7) to abridge the constitutional rights of any person.

(e) Federal financial assistance to schools unaffected

Notwithstanding the availability of any other remedy under the Constitution or the laws of the United States, nothing in this subchapter shall be construed to authorize the United States to deny or withhold Federal financial assistance to any school.

(f) Authority of schools with respect to order, discipline, well-being, and attendance concerns

Nothing in this subchapter shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the

well-being of students and faculty, and to assure that attendance of students at meetings is voluntary.

§ 4072. Definitions

As used in this subchapter–

(1) The term "secondary school" means a public school which provides secondary education as determined by State law.

(2) The term "sponsorship" includes the act of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting.

(3) The term "meeting" includes those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum.

(4) The term "noninstructional time" means time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.

§ 4073. Severability

If any provision of this subchapter or the application thereof to any person or circumstances is judicially determined to be invalid, the provisions of the remainder of the subchapter and the application to other persons or circumstances shall not be affected thereby.

§ 4074. Construction

The provisions of this subchapter shall supersede all other provisions of Federal law that are inconsistent with the provisions of this subchapter.